

Adoption of Administrative Procedures Governing Appeals

Requested Action: Discuss and adopt fourth and final draft of document. Three earlier drafts had been submitted to the Council, in June, July and August 2010.

This fourth draft contains:

- I. Administrative procedures governing appeals,
 - II. Statutory provisions requiring other consistency reviews, and
 - III. Other forms of review or evaluation by the Council.
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Background

- A. Statutory Mandate/Covered Actions.** The Sacramento-San Joaquin Delta Reform Act of 2009 grants the Council authority to ensure the consistency of state and local public agency actions with the Delta Plan (see Water Code Sections 85225-85225.30). The Act directs the Council to adopt procedures for early consultation on this matter and also establishes other general guidelines.

State and local agencies proposing to undertake a project covered by the Delta Plan must prepare and file a consistency determination with the Council. Any person may challenge that consistency determination by bringing an appeal to the Council. The Council, in turn, must hold a hearing on the appeal and issue written findings, either denying the appeal or remanding the matter to the state or local agency for reconsideration of the proposed project based on the finding that the consistency determination is not supported by substantial evidence in the record before the agency.

- B. Statutory Mandate/BDCP Appeal.** The Delta Reform Act also provides a separate process in which the Council may hear appeals with regard to determinations by the Department of Fish and Game (DFG) that the Bay Delta Conservation Plan (BDCP) has met the requirements of Water Code Section 85320 (that focus on compliance with the Natural Community Conservation Planning Act (NCCPA) and the California Environmental Quality Act (CEQA)) for inclusion in the Delta Plan.

Water Code section 85225.30 requires the Council to adopt administrative procedures governing appeals, which are exempt from the normal state rulemaking process.

Council Review of Third Draft in August. At its August meeting, the Council reviewed a third draft [8/12/2010] of the document containing I. Administrative

procedures governing appeals, II. Statutory provisions requiring other consistency reviews, and III. Other forms of review or evaluation by the Council. The document had been substantially revised from its prior version, primarily to address concerns of the five Delta counties with various procedures governing appeals related to “covered actions.”

Based upon the changes incorporated into the third draft relating to “covered actions”, the Coalition of Delta Counties submitted a letter of qualified support ahead of the August meeting.

After deliberation and public comment on the “covered actions” portion of the procedures, the Council directed staff to make several changes for purposes of clarification (including, for example, the addition of a statement in Paragraph 2 that the ultimate determination on whether a proposed project is a “covered action” shall be made by the state or local agency, subject to judicial review).

The Council next deliberated upon the second portion of the procedures, those relating to the standard of review regarding the BDCP. After discussion and public comment, the Council decided to delay voting on the entire document until its September meeting in order to consider other possible standards of review relating to the BDCP.

Alternative Standards of Review Relating to BDCP. The August third draft of the document had proposed in Paragraph 23 that the standard of review with regard to a BDCP appeal is “*de novo*” (in essence, taking an independent, fresh look at all the applicable facts and law to determine whether the BDCP meets the statutory criteria for inclusion in the Delta Plan and eligibility for public funding). Staff had proposed the *de novo* standard primarily because the Delta Reform Act limits Council appellate review of consistency determinations regarding “covered actions” to the deferential “substantial evidence” standard, whereas the Act contains no such limitation with regard to appeals regarding the BDCP (thereby implying a broad review authority). Several stakeholders, including the five Delta Counties, testified at the August meeting, and subsequently submitted written comments, in favor of *de novo* review.

State and Federal Contractors Water Agency testified at the August meeting (as they had at prior meetings with regard to earlier drafts of the document) that the appropriate standard should not be *de novo*, but should be a limited, deferential review of DFG’s determination (akin to an “abuse of discretion” standard, which is similar to the “substantial evidence” standard to be employed upon appeal of covered actions). They asserted that deference is appropriate given DFG’s exclusive regulatory jurisdiction with regard to the NCCPA and its expertise with CEQA (which are the focus of the statutory criteria for inclusion of the BDCP in the Delta Plan). The Metropolitan Water District of Southern California submitted written comments in favor of this more deferential standard of review.

The Council, in deciding to delay its vote on the procedures until September, directed staff to prepare for its consideration a range of possible standards of review (with several "intermediate" standards falling in between *de novo* and substantial evidence). Further to that direction, staff has prepared Attachment 1, Proposed BDCP Standards of Review.

Option 1 is *de novo* - or fresh look - the least deferential to DFG. It is the standard of review contained in Paragraph 23 of the third draft.

Options 2A and 2B use the "**preponderance of the evidence**" standard -- Option 2A requires the Council, in reaching its decision using the preponderance standard, to "consider" DFG's reasoning and factual findings (and allows for clarification of same prior to decision). Option 2B requires the Council, in reaching its decision using the preponderance standard, to "give weight to" DFG's reasoning and factual findings (and similarly allows for clarification).

These possible intermediate options are between *de novo* and substantial review: they would require the Council to consider (Option 2A)/give weight (Option 2B) to DFG's findings (something not required by *de novo*), but still allow the Council to determine for itself whether DFG's determination was correct, based on the weight of the evidence (something not allowed by substantial evidence review, which is focused on whether the finding is "reasonable" or has support in the record evidence).

Option 3 uses the substantial evidence standard - This is the most deferential to DFG, and would require the council to accept "reasonable" DFG facts/findings, even if the council disagrees with them. This is the standard of review set forth in statute (and in Paragraph 14 of the Procedures) for appeals of "covered actions".

List of Attachments

Attachment 1 – Proposed BDCP Standards of Review

**Attachment 2 – Fourth Draft Document containing, "I. Administrative Procedures Governing Appeals; II. Statutory Provisions Requiring Other Consistency Reviews; and III. Other Forms of Review or Evaluation by the Council"

**Attachment 3 – Redline Version of Attachment 2

**Will be adjusted to reflect Council action on BDCP Standard of Review

Contact

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